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SH-309
202-224-5641

United States Senate

WASHINGTON, DC 20510-2309

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April 29, 2014

The Honorable Tom Wheeler, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler,

I am deeply disappointed that you are considering rules that would allow deep-pocketed companies to pay for preferential access to Internet Service Providers (ISPs). Pay-to-play deals are an affront to net neutrality and have no place in an online marketplace that values competition and openness. This proposal would create an online "fast lane" for the highest bidder—shutting out small businesses and increasing costs for consumers. I strongly urge you to reconsider this misguided approach and recommit to protecting the Open Internet for all Americans.

After the D.C. Circuit Court of Appeals remanded the FCC's Open Internet Order last January, I wrote you urging the Commission to "take any and all appropriate actions necessary to preserve net neutrality." Instead, you appear to be taking the opposite approach. Sanctioning pay-to-play arrangements would not preserve the Open Internet – it would destroy it.

Your proposal would grant Verizon, Comcast, and other ISPs the power to pick winners and losers on the Internet, which violates core net neutrality principles that you have publicly supported in the past. Although you claim that this proposal is not a "turnaround," it is difficult to understand how it does not flatly contradict your own Commission's Open Internet Order, which stated:

> "[I]f broadband providers can profitably charge edge providers for prioritized access to end users, they will have an incentive to degrade or decline to increase the quality of the service they provide to non-prioritized traffic. This would increase the gap in quality (such as latency in transmission) between prioritized access and non-prioritized access, induce more edge providers to pay for prioritized access, and allow broadband providers to charge higher prices for prioritized access. Even more damaging, broadband providers might withhold or decline to expand capacity in order to 'squeeze' non-prioritized traffic, a strategy that would increase the likelihood of network congestion and confront edge providers with a choice between accepting low-quality transmission or paying fees for prioritized access to end users."

In this Order, the Commission correctly identified pay-to-play deals as an anticompetitive threat to the Internet and to consumers. But rather than continue to fight this threat, your new proposal appears to embrace it. By creating a "commercial reasonableness" rule, the Commission would be formally sanctioning the very deals it sought to combat less than three years ago.

Struggling to craft a "commercially reasonable" standard misses the point: Pay-to-play arrangements are inherently discriminatory and anticompetitive, and therefore should be prohibited as a matter of public policy. They increase costs for consumers and give ISPs a disincentive to improve their broadband networks—undermining the FCC's mission to protect the public interest and strengthen the nation's broadband infrastructure.

The Commission wisely recognized the fundamental problems with pay-to-play arrangements three years ago, and the D.C. Circuit Court of Appeals deferred to your Commission's substantive judgment on this issue, as well. I urge you to recommit to this judgment. The Internet was developed at taxpayers' expense to benefit the public interest. It belongs to all of us. The FCC should be working to sustain competition and consumer benefits, not creating unnecessary tolls for businesses and consumers.

Thank you for your attention to this urgent matter. I look forward to continuing to work with you on this vitally important issue.

Sincerely,

Al Franken
United States Senator

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

June 17, 2014

The Honorable Al Franken
United States Senate
309 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Franken:

Thank you for writing to express your concerns regarding the need to reinstate rules to preserve an open Internet for all Americans. I share your sense of urgency on this matter. For this reason, I moved with dispatch to initiate a proceeding to consider new open Internet rules to replace those that were vacated by the D.C. Circuit Court of Appeals in the *Verizon* case. As you know, the *Notice of Proposed Rulemaking* ("*Notice*") adopted by the Commission in May 2014 begins that process. Therein, we ask a number of questions about the rules we need to adopt, as well as the appropriate legal foundation for such rules. Your letter touches on some of the most important issues presented in the *Notice*, and I will ensure that it is included in the record of the proceeding and considered as part of the Commission's review.

The Commission has struggled for over a decade with how best to protect and promote an open Internet. While there has been bipartisan consensus, starting under the Bush Administration with Chairman Powell, on the importance of an open Internet to economic growth, investment, and innovation, we find ourselves today faced with the worst case scenario: we have no Open Internet rules in place to stop broadband providers from limiting Internet openness. The *status quo* is unacceptable. The Commission has already found, and the court has agreed, that broadband providers have economic incentives and technological tools to engage in behavior that can limit Internet openness and harm consumers and competition. As such, the Commission must craft meaningful rules to protect the open Internet, and it must do so promptly. I can assure you that I will utilize the best tools available to me to ensure the Commission adopts effective and resilient open Internet rules. Unless and until the Commission adopts new rules, broadband providers will be free to block, degrade, or otherwise disadvantage innovative services on the Internet without threat of sanction by the FCC.

With respect to the legal foundation of the rules, I believe that the Section 706 framework set forth by the court provides us with the tools we need to adopt and implement robust and enforceable Open Internet rules.

Nevertheless, the Commission is also seriously considering moving forward to adopt rules using Title II of the Communications Act as the foundation for our legal authority. The *Notice* asks specific questions about Title II, including whether the Commission should 1) revisit its classification of Broadband Internet Access as an information service; or 2) separately identify and classify as a telecommunications service a service that "broadband providers . . . furnish to edge providers," as proposed by Mozilla in a May 5 Petition filed with the agency.

The *Notice* seeks comment on the benefits of both Section 706 and Title II, including the benefits of one approach over the other, to ensure the Internet remains an open platform for innovation and expression.

With respect to the substance of the rules, the proposals and questions in the *Notice* are designed to elicit a record that will give us a foundation to adopt strong, enforceable rules to protect the open Internet and prevent broadband providers from harming consumers or competition. I am especially sensitive to your concerns about pay-for-play, or paid prioritization arrangements, and the potential such arrangements have for creating an Internet that is fast for a few, and slow for everyone else. Let me be crystal clear: there must only be one Internet. It must be fast, robust and open for everyone. The *Notice* addresses this issue head-on, even asking if paid prioritization should be banned outright. It also proposes clear rules of the road and aggressive enforcement to prevent unfair treatment of consumers, edge providers and innovators. Small companies and startups must be able to reach consumers with their innovative products and services, and they must be protected against harmful conduct by broadband providers.

The *Notice* includes a number of proposals designed to empower consumers and small businesses who may find themselves subject to harmful behavior by a broadband provider. For example, the Court of Appeals did uphold our existing transparency rule, and the *Notice* proposes to strengthen that rule to require that networks disclose *any* practices that could change a consumer's or a content provider's relationship with the network. The *Notice* proposes the creation of an ombudsperson to serve as a watchdog and advocate for start-ups, small businesses and consumers. And the *Notice* seeks comment on how to ensure that all parties, and especially small businesses and start-ups, have effective access to the Commission's dispute resolution and enforcement processes.

This *Notice* is the first step in the process, and I look forward to comments from all interested stakeholders, including members of the general public, as we develop a fulsome record on the many questions raised in the *Notice*. To that end, in an effort to maximize public participation in this proceeding, we have established an Open Internet email address – openinternet@fcc.gov – to ensure that Americans who may not otherwise have the opportunity to participate in an FCC proceeding can make their voices heard. In addition, to ensure sufficient opportunity for broad public comment, we have provided a lengthy comment and reply period through September 10, 2014, that will allow everyone an opportunity to participate.

Again, I appreciate your deep interest in this matter and look forward to continued engagement with you as the proceeding moves forward.

Sincerely,

Tom Wheeler